

Syllabus

IN THE MATTER OF
KENNETH HAUER, TRADING AS HAUER DISTILLING
COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2460. Complaint, June 27, 1935—Decision, Aug. 7, 1936

Where an individual engaged in purchasing and bottling whiskies, and in purchasing, rectifying, and selling gins and other spirituous beverages, and in making gin by redistillation of purchased alcohol over juniper berries and other aromatics, and neither owning, operating, nor controlling any place where beverages are made by original distillation from grain, fruit, or vegetable mash, wort, or wash, and distilling no beverage, but purchasing his distilled spirituous requirements from distillers and bottling and reselling same, and in substantial competition, in course of his said business, with (1) individuals and concerns who manufacture and distill from mash, wort, or wash, whiskies, gins, and other spirituous beverages sold by them, and who truthfully use words "Distillery," "Distilleries," "Distiller," or "Distilling" as part of their corporate names, and on their stationery and on labels of the bottles in which they sell and ship their products, and with (2) those engaged in purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages, who do not use aforesaid words, as above set forth—

Represented, through use of his trade name, including word "Distilling," in his advertising matter and on his stationery, price lists, cartons, and on labels attached to bottles in which he sold and shipped his said products, preceded, on latter, in some cases, by words "Distilled by," "Manufactured by," or "Bottled by," as case might be, that he was a distiller of alcoholic beverages, as ordinarily accepted and understood in liquor industry from word "Distilling," i. e., maker of such beverages by original distillation from grain, fruit, or vegetable mash, and failed to negative false and misleading impression created thereby through statement on labels, in some cases, showing State in which liquor was distilled;

With effect of misleading and deceiving dealers and purchasing public, substantial portion of which prefers to buy spirituous liquors bottled by actual distillers and manufacturers thereof, into belief that said whiskies, etc., sold by him were by him made and distilled from mash, wort, or wash, and of inducing dealers and public, in such belief, to purchase said whiskies, etc., and of thereby diverting trade to him from competitors who did not, by their trade or corporate names, or in any other manner, represent that they were manufacturers, by distillation from mash, wort, or wash, of whiskies and other spirituous beverages, and with effect of securing advantage over concerns who did not pursue or practice such misrepresentation and falsely purport to be manufacturers, by reason of prestige attaching in wholesale trade to the distiller, and advantage thereof in overcoming sales resistance, and belief in minds of said trade and public that distiller, investment and expenses of which are, in general,

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greater than those of rectifier, controls the making of the product from start to finish, with all ingredients going therein within its own establishment, and with sales advantage therein embraced, and with capacity and tendency so to mislead and deceive, as above set forth; to the substantial injury of competition in interstate commerce:

Held, That such acts and practices, under the conditions and circumstances described, were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Charles F. Diggs* and *Mr. John W. Addison*, trial examiners.

Mr. PGad B. Morehouse for the Commission.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Kenneth Hauer, an individual trading as Hauer Distilling Company, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act, and it appearing to the said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is an individual trading under the name and style of Hauer Distilling Company and doing business under the laws of the State of Ohio, with his office and principal place of business in the city of Cincinnati, in said State. He is now, and for more than 1 year last past has been, engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous liquors and in the sale thereof in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of his said business he causes his said products when sold to be transported from his place of business aforesaid into and through various States of the United States to the purchasers thereof, consisting of wholesalers and retailers located in other States of the United States and the District of Columbia. In the course and conduct of his business as aforesaid, respondent is now, and for more than 1 year last past has been, in substantial competition with other individuals and with corporations, partnerships, and firms engaged in the manufacture by true distillation of whiskies, gins, and other spirituous liquors from mash, wort, or wash,

and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia and in the course and conduct of his business as aforesaid, respondent is, and for more than 1 year last past has been, in substantial competition with other individuals and with corporations, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous liquors and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Upon the premises of respondent's place of business aforesaid there is a still for use in the production of gins by a process of rectification whereby alcohol, purchased but not produced by respondent, is redistilled over juniper berries and other aromatics. Such rectification of alcoholic spirits does not make or constitute respondent a distillery or a distiller, as defined by section 3247 of the Revised Statutes regulating internal revenue, nor as commonly understood by the public and the liquor industry. For a long period of time the word "Distilling" when used in connection with the liquor industry and with the products thereof has had and still has a definite significance and meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public, to wit, manufacturing of spirituous liquors by a process of original distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete, and a substantial portion of the purchasing public prefers to buy spirituous liquors bottled and prepared by distillers.

PAR. 3. In the course and conduct of his business as aforesaid by the use of the word "Distilling" in his trade name, printed on his stationery, catalogs, advertising, and labels attached to the bottles in which he sells and ships his said products, and in various other ways, respondent represents to his customers and furnishes them with the means of representing to their vendees, both retailers and the ultimate consuming public, that he is a distiller and that the said whiskies, gins, and other spirituous liquors therein contained were by him manufactured through the process of distillation from mash, wort, or wash, when, as a matter of fact, respondent is not a distiller, does not distill the said whiskies, gins, and other spirituous liquors by him so bottled, labeled, sold, and transported, and merely by the use of a still operated by him as aforesaid in the rectification of alcoholic spirits by redistillation over juniper berries and other aromatics, does not distill the whiskies, gins, and other spirituous liquors by him so bottled, labeled, sold, and transported in the sense

in which the word "distilling" is commonly accepted and understood by those engaged in the liquor trade and the public. Respondent does not own, operate, or control any place or places where spirituous liquors are manufactured by a process of original and continuous distillation from mash, wort, or wash.

PAR. 4. There are among the competitors of respondent engaged in the sale of spirituous beverages, as mentioned in paragraph 1 hereof, corporations, firms, partnerships, and individuals who manufacture and distill from mash, wort, or wash, whiskies, gins, and other spirituous liquors sold by them and who truthfully use the words "distillery," "distilleries," "distillers," or "distilling" as a part of their corporate or trade names and on their stationery, catalogs, advertising, and on the labels of the bottles in which they sell and ship such products. There are also among such competitors corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, bottling, and selling whiskies, gins, and other spirituous liquors who do not use the words "distillery," "distilleries," "distilling," or "distillers" as a part of their corporate or trade names, nor on their stationery, catalogs, advertising, nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 5. The representations by respondent, as set forth in paragraph 3 hereof, are calculated to and have a capacity and tendency to and do mislead and deceive dealers and the purchasing public into the beliefs that respondent is a distiller and that the whiskies, gins, and other spirituous liquors sold by respondent are manufactured or distilled by him from mash, wort, or wash by one continuous process and are calculated to and have the capacity and tendency to and do induce dealers and the purchasing public, acting in such beliefs, to purchase the whiskies, gins, and other spirituous liquors rectified and bottled by the respondent, thereby diverting trade to respondent from his competitors who do not by their corporate or trade name or in any other manner misrepresent that they are distillers, and thereby respondent does substantial injury to substantial competition in interstate commerce.

PAR. 6. The acts and things above alleged to have been done and the false representations alleged to have been made by respondent are to the prejudice of the public and the competitors of respondent and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission on June 27, 1935, issued, and on June 28, 1935, served its complaint in this proceeding upon respondent, Kenneth Hauer, an individual trading as Hauer Distilling Company, charging him with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint, and the filing of respondent's answer thereto, testimony and evidence, in support of the allegations of said complaint were introduced by PGad B. Morehouse, attorney for the Commission, before Charles F. Diggs, an examiner of the Commission, theretofore duly designated by it and thereafter before John W. Addison, an examiner of the Commission duly substituted to take testimony in the place and stead of the said Charles F. Diggs; no testimony was offered in opposition to the allegations of the complaint; and the testimony and evidence in support of the complaint were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and evidence, and brief in support of the complaint; brief of respondent and all oral argument having been waived; and the Commission having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Kenneth Hauer, the respondent, is an individual who, for more than a year prior to June 1935, conducted the business of a rectifier and wholesaler of liquors, with his principal place of business at 420 Augusta Street, Cincinnati, Ohio. He purchased and bottled without rectification, whiskies and purchased, rectified and sold gins and other spirituous beverages up until June 1935 to wholesalers in the States of Kentucky, Texas, New Jersey, and Indiana, his sales for the year ending June 1935 being approximately \$56,000 in volume. The Commission finds that prior to June 1935 this respondent engaged in such business in constant course of trade and commerce between and among the various States of the United States and in the District of Columbia. In the course and conduct of his said business he caused the said products, when sold, to be transported from his place of business aforesaid into and through various States

of the United States to the purchasers thereof located in States of the United States other than the State of Ohio. In the course and conduct of his business as aforesaid, respondent until June 1935 was for more than a year, in substantial competition with other individuals, corporations, firms, and partnerships engaged in the manufacture by distillation of whiskies, gins, and other spirituous beverages and in the sale thereof in trade and commerce between and among the various States of the United States and in the District of Columbia; and in the course and conduct of his business as aforesaid, during the same period of time, respondent was in substantial competition with other individuals, corporations, firms, and partnerships engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages and in the sale thereof in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. Rectifying, in the distilled spirits rectifying industry, means the mixing of whiskies of different ages and types, or the mixing of other ingredients with whiskies, but reducing proof of whisky by adding water is not rectifying. Rectifiers also blend whiskies with neutral spirits (grain alcohol).

A distiller, in the sense ordinarily understood by the liquor industry, is one who prepares distilled spirits by a process of original and continuous distillation from mash, wort, or wash, through continuous closed pipes and vessels until the manufacture thereof is complete. Many distillers operate a separate establishment 600 feet or more away from their distillery, known as a rectifying plant, wherein they operate in the same manner as described above, for a rectifier—sometimes exclusively with spirits of their own distillation and sometimes with spirits purchased from other distillers or both. Some distilleries have a tax-paid bottling room on the distillery bonded premises wherein their distilled spirits are bottled straight as they come from the still, or in a bonded warehouse after aging, or after reduction of proof. Any rectifying by a distiller, however, must be done in his rectifying plant under his rectifier's permit. On all bottled liquors, whether bottled at the distillery or at any rectifying plant, appear the words "Bottled" or "Blended (as the case may be) by the ----- Company." If the distilled spirits therein contained are bottled by a distiller either in his distillery or are spirits of his own distillation bottled in his rectifying plant, the distiller may, and does, put "Distilled and Bottled by ----- Company". If, in the distillery's rectifying plant, other spirits have been blended or rectified he puts "Blended and Bottled by ----- Company". Finally, blown (usually in the bottom) of

each bottle is a symbol, consisting of a letter followed by a number, identifying the bottler, viz, a "D" for a distillery and "R" for a rectifier, the number following said letter corresponding with the distiller's or rectifier's permit. Thus "R-243" designates this respondent. A distiller who also operates a rectifying plant, having both kinds of permits, may use either symbol, depending upon whether the liquor contained in the bottle was produced and bottled under his distiller's permit.

It is not always possible to determine from the presence of the phrase "Blended and Bottled by" or the phrase "Bottled by" on the label whether the package was bottled by a rectifier, who is a distiller or by a rectifier who is not a distiller.

PAR. 3. This respondent purchased his distilled spirits requirements from distillers, bottled and resold the same in interstate commerce. The only rectifying which he did was the production of gin from purchased alcohol by the process hereinafter set out. In the course and conduct of his business, respondent represented through the use of his trade name, "Hauer Distilling Company", in his advertising matter, on his stationery, price lists, cartons, and labels attached to the bottles in which he sold and shipped his said beverages, that he was a distiller of alcoholic beverages, in the sense in which "distiller" is ordinarily accepted and understood in the liquor industry. On labels for gins redistilled by him, the name was preceded by the words "Distilled by" or "Manufactured by" and on the labels for some of his whisky, the name was preceded by the words "Bottled by". Some of his labels for whisky contained nothing to indicate that the whisky was not distilled by him except "Permit Fed. R-243". Others of such labels named the State in which the whisky was distilled. The impression that respondent was a distiller, to be gained from reading these labels, was not negatived by the fact that in some cases labels appeared on the bottles showing the State in which the liquor was distilled, as presumptively and actually real distillers may and do have distilleries located in more than one State and in States other than the sites of their rectifying plants.

Respondent was a rectifier and not a distiller in the sense ordinarily accepted and understood when such term is used in the liquor industry. He does not now and never did own, operate, or control any place where beverages are made by original distillation from grain, fruit, or vegetable mash, wort, or wash, and he does not now or never did distill any beverage. He had a still which he used in making gin by redistillation of purchased alcohol, not produced by him, over juniper berries and other aromatics, but this redistillation

did not make respondent a distiller as defined by United States Code, title 26, section 241, regulating internal revenue, nor as commonly understood by the public and the liquor industry. As shown by the testimony of many witnesses who for long periods of time had been and still were actively engaged in the liquor industry, including distillers, wholesalers, and retailers, and by the testimony of representative members of the consuming public, for a long period the word "distillers" when used in connection with the liquor industry and with products thereof has had, and still has, the definite significance and meaning to the minds of wholesalers and retailers in such industry and to the ultimate purchasing public of making beverages by original distillation from grain, fruit, or vegetable mash.

In general the investment and expenses of the distiller are greater than those of the rectifier.

Much of the "distilled" gin on the market is produced by companies who do distill their own alcohol and produce gin therefrom by redistillation in exactly the same manner that respondent produced his gins—not under any distillery permit, but under a rectifying permit. These distiller-rectifiers place on their gin labels "Distilled by ----- Distillers". These are distilleries which produce gin by the same process in the distillery by one continuous process and the tax is paid at the completion of the process, that is, after the alcohol becomes gin, so that although the final redistillation process is the same as that of respondent, yet it is all done in a distillery and the distiller has control over the process from the mash to the gin. Thus it includes original or primary distillation through closed pipes and vessels, as well as the final process of redistillation over the juniper berries.

Section 5 of the Federal Alcohol Administration Act, approved August 29, 1935, dealing with unfair competition and unlawful practices in the industry, provides that it shall be unlawful to sell in bottles any distilled spirits in interstate or foreign commerce unless they are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Administrator, as will prohibit deception of the consumers with respect to such products.

Existing regulations and regulations proposed under this act define "distilled gin" as the distillate by original distillation or redistillation of neutral spirits with aromatics.

The regulations further provide that on labels of domestic distilled spirits bottled by or for the actual distiller thereof, there shall be stated the words "distilled by" and immediately thereafter the name of such distiller and the place where distilled.

PAR. 4. There were and still are among the competitors of respondent engaged in the sale of spirituous beverages as mentioned in paragraph 1 hereof corporations, firms, partnerships, and individuals who manufacture and distill from mash, wort, or wash, whiskies, gins, and other spirituous beverages sold by them and who truthfully use the words "distillery," "distilleries," "distillers," or "distilling," as a part of their corporate names and on their stationery, and on the labels of the bottles in which they sell and ship such products. There are also among such competitors corporations, firms, partnerships, and individuals engaged in the business of purchasing, rectifying, blending, and bottling whiskies, gins, and other spirituous beverages who do not use the words "distillery," "distilleries," "distilling," or "distillers" as a part of their corporate names, nor on their stationery nor on the labels attached to the bottles in which they sell and ship their said products.

PAR. 5. A substantial portion of the purchasing public prefers to buy spirituous liquors bottled by the actual distillers and manufacturers thereof, and this respondent's aforesaid misrepresentation had a tendency to mislead and deceive dealers and the purchasing public, with the resultant tendency to induce them to buy respondent's products in preference to the products of truthful competitors.

The testimony clearly showed and the Commission finds that a prestige attaches in the minds of the wholesale trade to the distiller, and that that prestige is an advantage in overcoming sales resistance; that in the mind of the wholesale trade and the public, the belief that a distiller controls the making of such products from start to finish, with all the ingredients going into them within its own establishment, constitutes a sales advantage; and that such use as respondent made of the word "Distilling" in his trade name gave him an advantage over concerns who did not pursue or practice such misrepresentation and who did not purport to be manufacturers when they were not.

The Commission therefore finds that the representation of respondent through use of the word "Distilling" in his trade name as aforesaid was calculated to and had the capacity and tendency to and did mislead and deceive dealers and the purchasing public into the belief that the whiskies, gins, and other spirituous beverages sold by the respondent were manufactured and distilled by him from mash, wort, or wash and was calculated to and had the capacity and tendency to and did induce dealers and the purchasing public, acting in such belief, to purchase the whiskies, gins, and other spirituous beverages bottled and sold by the respondent, thereby diverting trade

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to respondent from his competitors who did not by their trade or corporate names or in any other manner misrepresent that they were manufacturers by distillation from mash, wort, or wash of whiskies, gins, and other spirituous beverages, and thereby respondent did substantial injury to competition in interstate commerce.

PAR. 6. Because of existing regulations, and regulations proposed under the Federal Alcohol Administration Act approved August 29, 1935 (49 Stat. 977), and which regulations are presently expected to become effective as of August 15, 1936, providing that rectifiers who redistill purchased alcohol over juniper berries and other aromatics may label such resulting product "distilled gin", and requiring that the labels state who distilled it, the Commission has excepted gins produced by respondent by redistillation of alcohol over juniper berries and other aromatics from the prohibitions of its order.

CONCLUSION

The aforesaid acts and practices of the said respondent, under the conditions and circumstances hereinbefore described, were to the prejudice of the public and respondent's competitors, and were unfair methods of competition in interstate commerce, constituting a violation of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission issued on June 27, 1935, and served on June 28, 1935, the answer of respondent, testimony and evidence taken before Charles F. Diggs and John W. Addison, examiners of the Commission theretofore duly designated by it in support of the charges of the complaint, no testimony having been offered by respondent in opposition thereto, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is ordered, That Kenneth Hauer, an individual, trading as Hauer Distilling Company, his agents, salesmen, and employees, in connection with the offering for sale or sale by him in interstate commerce of whiskies, gins, and other spirituous beverages, except gins produced by a process of rectification whereby alcohol purchased but not

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produced by respondent is redistilled over juniper berries and other aromatics, do cease and desist from:

Representing, through use of the word "Distilling" in his trade name, on his stationery, advertising or on the labels attached to the bottles in which he sells and ships said products, or in any other way by word or words of like import, (a) that he is a distiller of whiskies, gins, or any other spirituous beverages; or (b) that the said whiskies, gins or other spirituous beverages were by him manufactured through the process of distillation; or (c) that he owns, operates, or controls a place or places where any such products are by him manufactured by a process of original and continuous distillation from mash, wort or wash, through continuous closed pipes and vessels until the manufacture thereof is completed, unless and until respondent shall actually own, operate or control such a place or places.

It is further ordered, That the said respondent, within 30 days from and after the date of the service upon him of this order, shall file with the Commission a report or reports in writing setting forth in detail the manner and form in which he is complying and has complied with the order to cease and desist hereinabove set forth.

IN THE MATTER OF
VERNON WHITE & COMPANY ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2552. Complaint, Sept. 14, 1935—Decision, Aug. 7, 1936

Where three corporations, and an individual who directly or indirectly controlled and managed the same, engaged in sale and distribution of food products, including imitation jelly concentrate designated "YUM-YUM"—Represented in circulars distributed to customers and prospective customers that "Each package will make 5 glasses of pure fruit jelly", and that "YUM-YUM is the pure fruit jelly itself and saves the housewife long, tiresome hours over a hot stove making jelly that is oftentimes not a success", and, by printed statements on the cardboard containers thereof, that it "Contains genuine true fruit flavor, fruit acid derived from grapes, pectin, corn sugar and harmless vegetable color";

Facts being said preparation did not make food product known and identified as jelly, i. e., that semisolid, gelatinous product made by concentrating to a suitable consistence the strained juice or water extract from fresh fruit, cold pack fruit, canned fruit, or a mixture of two or all of them, with sugar or with sugar and dextrose, but made imitation jelly product containing fruit juice concentrate or extract, fruit acid derived from grapes, pectin, corn sugar, and vegetable color, and product was not made from the pure fruit itself;

With effect of misleading and deceiving purchasers into the false and erroneous belief that said representations were true and of thereby inducing them, in reliance upon such beliefs, to purchase said product, and with capacity and tendency so to do, and thereby tend to divert, and with effect of diverting, trade to them from competitors who do not in any manner misrepresent the kind, nature, ingredients, or quality of their products, to the substantial injury of such competitors, and competition in commerce:

Held, That such acts and practices, under the conditions and circumstances set forth, were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. John W. Bennett*, trial examiner.

Mr. Jay L. Jackson for the Commission.

COMPLAINT

Pursuant to the provisions of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, the Federal Trade Commission, having reason to believe that Vernon White & Company, a corporation, Thayer Sales Corporation, a corporation, Federal Pure Food Company, a corporation, and T. E. Hanshaw, hereinafter referred to as respondents, have been and are using unfair